

The Honorable Thomas S. Zilly

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

PACIFIC BELLS, LLC; BRUNSWIKST,  
LLC; and WOW DISTRIBUTING, INC.,  
in their own and on behalf of similarly  
situated employers,

and

MELISSA JOHNSTON; LENA  
MADDEN; JUDI CHAPMAN;  
KATHERINE SOLAN; JOHN  
EDMUNDSON; and MIKE LINDBO,  
individuals on their own behalf and on  
behalf of similarly situated employees,

Class Plaintiffs,

v.

JAY INSLEE, in his capacity as Governor  
of the State of Washington; CAMI FEEK,  
in her capacity as the Commissioner and  
Chief Executive Officer of the Washington  
Employment Security Department;  
DONALD CLINTSMAN, in his capacity  
as the Acting Secretary of the Washington  
Department of Social and Health Services;  
and THE LONG-TERM SERVICES AND  
SUPPORTS TRUST FUND, an employee  
benefit plan,

Defendants.

NO. 21-cv-01515-TSZ

DEFENDANTS'  
SUPPLEMENTAL BRIEF

**A. The Plaintiffs Have the Burden to Establish this Court has Jurisdiction, Including any Facts Necessary to Show that the Tax Injunction Act Does Not Bar Jurisdiction**

The Court should “presume that federal courts lack jurisdiction ‘unless’ the contrary appears affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986)) (cleaned up); *see also Warth v. Seldin*, 422 U.S. 490, 518 (1975). And it is the plaintiff who bears the burden to show the Tax Injunction Act does not bar jurisdiction. *See Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 341 (1990) (holding plaintiff bore burden to prove there was no “plain, speedy, and efficient remedy” under the Tax Injunction Act); *see also Chase Manhattan Bank, N.A. v. City and County of San Francisco*, 121 F.3d 557, 559 (9th Cir. 1997) (same). Therefore, it is the plaintiff’s burden to show that the Tax Injunction Act does not apply. In this case, that includes establishing the number of people that will pay premiums under the WA Cares program to the extent that fact is relevant to the inquiry.

**B. Washington Workers Subject To, Exempt From, And Opted-In to WA Cares**

**Population paying premiums:** Approximately 3,410,911 Washington workers employed by an employer will be required to pay premiums in 2023. Declaration of April Amundson (Amundson Decl.) ¶ 11. This is about 83 percent of the total estimated employee population. *See id.* at ¶ 3 (4,091,072 employees estimated to work in Washington State in 2023).

**Opt-outs:** The Washington State Employment Security Department (ESD) has received and approved 473,510 applications to opt out of WA Cares by individuals who had purchased a private long-term care insurance policy by November 2021. *Id.* at ¶ 2.

**New exemptions:** ESD estimates that 206,651 Washington workers will be exempt from WA Cares under the new exemptions enacted by the Washington State Legislature in 2022. *Id.* at ¶ 9.

**Opt-ins:** ESD estimates that in 2023, 233,191 people will be self-employed in Washington State. Of these, ESD estimates that as many as 40,000 of them will opt-in to WA Cares, but this is mostly likely a high estimate. *Id.* at ¶ 10. Self-employed, opt-in participants are, therefore,

1 estimated to be at most about one percent of the total WA Cares participant population.

2 **C. Melissa Johnston Lacks Standing And Should be Dismissed**

3 “Melissa Johnston resides in Eagle Point, Oregon.” Dkt. 1 at p. 4:7. Any “employee who  
4 is employed by an employer in Washington, but maintains a permanent address outside of  
5 Washington as the employee’s primary location of residence” is exempt from payment of WA  
6 Cares premiums. 2022 Wash. Sess. Laws, ch. 2 § 2. Ms. Johnston is not injured by the WA Cares  
7 premiums that she challenges, she lacks standing, and should be dismissed as a plaintiff. *See*  
8 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

9 **D. WA Cares Does *Not* Meet the Definition of an Employee Benefit Plan**

10 A “threshold requirement” for ERISA coverage is that a plan must be “established or  
11 maintained by an employer.” *Howard Jarvis Taxpayers Assn. v. California Secure Choice Ret.*  
12 *Sav. Program*, 997 F.3d 848, 859 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1204 (2022); *see also*  
13 29 U.S.C. §§ 1002(1)-(3), 1003(a). Because of this requirement, the Ninth Circuit rejected an  
14 ERISA preemption challenge to a similar state-enacted benefit program in California, known as  
15 CalSavers. As the court explained, “the ERISA-required ‘employer’ that supposedly ‘established  
16 or maintained’” CalSavers “could only be one of two entities”: the state or the private companies  
17 whose employees receive benefits. *Howard Jarvis*, 997 F.3d at 859. The Ninth Circuit held that  
18 California was not the “employer” of every worker statewide. And while the companies were  
19 “employers,” they did not “establish or maintain” the state-enacted benefit program. As detailed  
20 below, the same conclusions follow here.

21 **1. Washington State Is Not the “Employer”<sup>1</sup>**

22 As *Howard Jarvis* explained, it “seems quite clear that although California ‘established  
23 or maintained’ CalSavers, it did not do so in the capacity of an ‘employer.’” 997 F.3d at 859.

24 <sup>1</sup> The State does not qualify as an “employee organization,” which means an organization “in which employees  
25 participate and which exists for the purpose ... of dealing with employers concerning an employee benefit plan.”  
26 29 U.S.C. § 1002(4); *see also Greenwood v. Hartford Life Ins. Co.*, 471 F.Supp.2d 1049, 1052 (C.D. Cal. 2007)  
 (“‘[E]mployee organization’ for the purposes of ERISA and under the plain meaning of section 1002(4) is to cover  
 labor unions and other traditional organizations established by employees of a particular employer.”).

1 ERISA defines “employer” to mean “any person acting directly as an employer, or indirectly in  
 2 the interest of an employer.” 29 U.S.C. § 1002(5). The court easily concluded that California  
 3 “does not employ” the CalSavers participants, who are employed by private businesses.  
 4 997 F.3d at 860. Likewise, Washington is not the direct “employer” of the employees covered  
 5 by WA Cares, who work for various businesses throughout Washington.<sup>2</sup>

6 Similarly, as the court concluded in *Howard Jarvis*, the State is not “acting ‘indirectly in  
 7 the interest of an employer’” because it does not “represent employers in any relevant sense.”  
 8 *Id.* The State is not an agent implementing a benefit promise “*on behalf of*” employers”; on the  
 9 contrary, it has “step[ped] in where the State regards eligible [] employers as having failed to  
 10 provide their workers with desirable” benefits. *Id.* (emphasis added). “[E]mployers have no say  
 11 over how [the program] is operated; they did not create it, nor do they control it.” *Id.* The State  
 12 makes these decisions on its own accord. *Accord Golden Gate Rest. Ass’n v. City and County of*  
 13 *San Francisco*, 546 F.3d 639, 654 (9th Cir. 2008) (“When the City administers the [City-  
 14 sponsored health program], it does not act as the employer’s agent entrusted to fulfill the benefits  
 15 promises the employer made to its employees”).

## 16 **2. Private Employers Do Not “Establish or Maintain” a Benefit Plan**

17 “The ‘established or maintained’ requirement ... ‘appears designed to ensure that the  
 18 plan is part of an employment relationship.’” *Howard Jarvis*, 997 F.3d at 859-60 (citation  
 19 omitted); *accord Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1049 (10th Cir. 1992).  
 20 This is determined by “looking at the degree of participation by the employer.” *Peckham*,  
 21 964 F.2d at 1049. Employers’ “ministerial obligations” under WA Cares “do not resemble the  
 22 establishment or maintenance of an ERISA plan.” *Howard Jarvis*, 997 F.3d at 866.

23 “[T]he ‘establishment’ of an ERISA plan requires both a ‘decision to extend benefits’  
 24 and some ‘[a]cts or events that record, exemplify or implement the decision,’ such as ‘financing

25 <sup>2</sup> To the extent WA Cares is also available to employees of the State, a program covering governmental  
 26 employees cannot be an ERISA plan because plans “established or maintained” by state governments for their  
 employees are expressly exempted from ERISA’s coverage. *See* 29 U.S.C. §§ 1002(32), 1003(b)(1).

1 or arranging to finance or fund the intended benefits” or “establishing a procedure for disbursing  
 2 benefits.”” *Howard Jarvis*, 997 F.3d at 860 (citation omitted). Washington employers do not  
 3 satisfy either requirement. Employers did not make the decision to extend benefits; the State did.  
 4 *See Cent. Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 743 (2003) (recognizing the  
 5 “centrality of ERISA’s object of protecting employees’ justified expectations of receiving the  
 6 benefits their *employers* promise them.”) (emphasis added). Nor do employers fund the benefits  
 7 or establish the procedures for disbursing benefits: *employees* pay premiums pursuant to a system  
 8 established by the State, *e.g.*, Wash. Rev. Code § 50B.04.080, and the State established the  
 9 framework and procedures for providing benefits, *e.g.*, *id.* §§ 50B.04.020, 50B.04.060,  
 10 50B.04.070.

11 Employers also do not “maintain” WA Cares. To “maintain” a plan means to “care[] for  
 12 the plan for purposes of operational productivity.” *Howard Jarvis*, 997 F.3d at 861 (citations  
 13 omitted). Plaintiffs complain that WA Cares requires employers to “determine” which wages  
 14 and employees are subject to the Act (dkt. 1 at p. 10:16) but the definition of “employee” and  
 15 “wages” is consistent with other aspects of Washington law and based on objective, non-  
 16 discretionary criteria. *See* Wash. Rev. Code § 50B.04.010(7), (17). The Ninth Circuit has  
 17 squarely rejected the notion that such limited, non-discretionary responsibilities rise to the level  
 18 of “maintaining” an ERISA plan. In concluding that a city-operated health program was not  
 19 “maintained” by employers, the Ninth Circuit held that any “burden” on employers “entailed in  
 20 keeping track of which workers perform qualifying work” was “not enough” to convert the  
 21 program into an ERISA plan. *Golden Gate*, 546 F.3d at 650.

22 Employers also must withhold premiums from employee paychecks and remit them to  
 23 the State on a quarterly basis. Wash. Rev. Code § 50B.04.080; Wash. Admin. Code  
 24 § 192-910-010. But Courts routinely hold that withholding earnings and forwarding payments  
 25 to another entity does not constitute the “establishment” or “maintenance” of a plan. *See, e.g.*,  
 26 *Reliance Ins. Co. v. Ziegler*, 938 F.2d 781, 784 (7th Cir. 1991); *Graham v. Hartford Life & Acc.*

1 *Ins. Co.*, 589 F.3d 1345, 1354 (10th Cir. 2009). Thus, the Ninth Circuit concluded that employers  
 2 did not “maintain” the CalSavers program where they performed “essentially mechanical” acts,  
 3 such as “evaluating employee eligibility according to non-discretionary criteria; providing the  
 4 State with employee identification and contact information; and processing specified payroll  
 5 deductions according to set formulae.” *Howard Jarvis*, 997 F.3d at 862.

6 “[I]n the context of a government-sponsored benefit in which an employer has mandatory  
 7 back-end responsibilities, ‘an employer’s administrative duties must involve the application of  
 8 more than a modicum of discretion’” to “establish or maintain” an ERISA plan. *Id.* at 861  
 9 (quoting *Golden Gate*, 546 F.3d at 650). This is because “[i]t is within the exercise of ...  
 10 discretion that an employer has the opportunity to engage in the mismanagement of funds and  
 11 other abuses with which Congress was concerned when it enacted ERISA.” *Golden Gate*,  
 12 546 F.3d at 650. Where, as here, employers do not have discretion over funds or the eligibility  
 13 for benefits, the concerns underlying ERISA are not implicated. *Id.*; accord *Howard Jarvis*,  
 14 997 F.3d at 861.

15 In *Howard Jarvis*, the Ninth Circuit ultimately concluded that “it is the State that has  
 16 established CalSavers and the State that maintains it—and not eligible employers”:

17 California created CalSavers. California determines the eligibility for both  
 18 employers and employees. California enrolls eligible employees.... California acts  
 19 as the sole fiduciary over the trust and program, with the Board making all  
 20 investment decisions .... And California is ‘free to change the kind and level of  
 benefits as it sees fit.’ All of this confirms that “the [State], rather than the  
 employer, establishes and maintains” CalSavers.

21 *Id.* at 862 (citation omitted). Similarly, Washington—and not any private employers—  
 22 “established” and “maintains” WA Cares. And because Washington is not the employer, WA  
 23 Cares is not an ERISA plan. 29 U.S.C. §§1002(1)-(3), 1003(a).<sup>3</sup>

24 <sup>3</sup> Plaintiffs are also incorrect that a voluntary opt-out matters to the ERISA analysis. Dkt. 1 at p. 11:15. They cite  
 25 *Howard Jarvis*, but the ability of employees to opt out was not part of the court’s analysis. Plaintiffs also cite a DOL  
 26 safe harbor for *individual retirement accounts*, *id.* (citing 29 C.F.R. § 2510.3-2(d)). Even if that safe harbor applied  
 to the *long-term care* benefits at issue here, which it does not, *Howard Jarvis* recognized that failing a safe harbor  
 just means a program is “subject to further evaluation under the conventional tests.” 997 F.3d at 857.

1 DATED this 31st day of March, 2022.

2  
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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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I certify under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 18th day of March, 2022, at Olympia, Washington.

*s/ William McGinty*  
\_\_\_\_\_  
WILLIAM MCGINTY  
*Assistant Attorney General*